

STEPHEN AND CATHY KLEIN,
PETITIONERS

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BEFORE THE ZONING BOARD
OF HOWARD COUNTY
ZONING BOARD CASE NO. 1083M

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DECISION AND ORDER

On June 16, 2011, the Zoning Board of Howard County, Maryland ("Board") considered the petition of Stephen and Cathy Klein ("Petitioners") to amend the Zoning Map of Howard County to reclassify from the R-20 (Residential: Single) District to the B-1 (Business: Local) District, 6.33 acres of land located on the south side of Maryland 108, approximately 150 feet southwest of Sheppard Lane, identified as Tax Map 35, Grid 1, Parcel 1, 12161 and 12171 Clarksville Pike, in the 4th Election District of Howard County, Maryland.

The notice of hearing was advertised, the subject property was posted with notice of the hearing, and the adjoining property owners were mailed notice of the hearing as evidenced by the certificates of posting, advertising and mailing to adjoining property owners which were entered into the record. Pursuant to the Zoning Board's Rules of Procedures, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning ("DPZ"), and the Planning Board's recommendation, were entered or incorporated into the record of the hearing. DPZ recommended "tentative approval" of the petition. The Planning Board recommended that the Zoning Board deny the petition.

Petitioners were represented by William E. Erskine, Esquire and Ronald S. Schimel, Esquire. David Elsaesser acted as a spokesperson for several neighboring residents who opposed the petition, some of whom also spoke in opposition to the petition. Susan Smith, on behalf of

the River Hill Village Association, opposed the petition. None of the Protestants were represented by counsel. Eileen Powers, Esquire, Zoning Counsel, appeared pursuant to Section 16.1000 of the Howard County Code. The Board conducted hearings on April 14 and June 15, 2011. An Exhibit List, showing the exhibits introduced into the record of the hearings, is attached to this Decision and Order.

After careful evaluation of the evidence, the Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The subject property is the site of the River Hill Garden Center ("Garden Center"). Based on information in the petition and DPZ's Technical Staff Report, and the lack of contrary evidence presented by Zoning Counsel and Protestants, the Board finds as follows with respect to the history of the subject property's zoning and development:

a. The subject property was zoned R-40 in the 1961 Comprehensive Zoning. In the 1977 Comprehensive Zoning, the subject property was zoned R (Rural), a status that remained unchanged in the 1985 Comprehensive Zoning.

b. In 1988, Petitioners entered into an agreement to lease the property as a retail garden center. The Zoning Regulations in effect at the time required that the Petitioners obtain a special exception in order to operate the Garden Center. In 1989, the Howard County Board of Appeals considered the petition of Stephen M. Klein for a special exception to establish and operate the Garden Center. Mr. Klein's petition was unopposed. Whistling Winds Walk and the homes that are currently on that street did not exist at the time. On February 28, 1989, the Board of Appeals granted the petition for special exception, subject to certain conditions, including that the hours of operation of

the retail garden center “shall be no earlier than 9:00 a.m. and no later than 6:00 p.m., seven (7) days per week.”

c. In the 1993 Comprehensive Zoning, the subject property was rezoned to the R-20 Zoning District. Because retail garden centers were also permitted as a special exception in the R-20 Zoning District, the 1993 Comprehensive Zoning did not impact the garden center’s special exception status.

d. In 2001, the County Council enacted CB 11-2001, Zoning Regulation Amendment (ZRA) 30. In addition to replacing the term “special exception” with the term “conditional use,” and making numerous other changes to the Regulations, ZRA 30 removed the retail garden center special exception from the R-20 District. With the passage of ZRA 30, the Garden Center became a “nonconforming use.” Nonconforming uses are governed by Section 129 of the Zoning Regulations, which considerably limits the continuing use and redevelopment of property classified as a nonconforming use. Petitioners were unaware that ZRA 30 affected the zoning classification of the property and their rights to expand or otherwise seek changes with respect to its use as the Garden Center.

e. During the 2004 Comprehensive Zoning, Petitioners requested that the Garden Center property be rezoned from the R-20 Zoning District to B-1 Zoning District. DPZ recommended approval of the request. In its Technical Staff Report, which was provided to the Planning Board and County Council, DPZ described the subject property as an “[e]xisting conditional use within commercial and institutional area,” a description that was plainly inaccurate. The Planning Board recommended against rezoning the subject property, stating in its written recommendation and commentary to the Council:

“inappropriate expansion of commercial use in residential area. Direct DPZ to explore expanding accessory uses for retail nursery.”

f. On October 2, 2003, Petitioners’ request was heard at a public hearing before the County Council, as part of its comprehensive zoning process. In support of his request, Mr. Klein testified that B-1 was necessary in order to expand the range of goods and services that the Garden Center could provide to its customers, including a deli café. Following Mr. Klein’s testimony, Councilman Ulman cited some concerns by neighboring property owners and commented: “...we see the Planning Board and the Department have different recommendations and I certainly look forward to, and I think from all accounts except for those accounts that I had heard from those residents, *you provide a great service for the community*. So I guess my only comment is I hopefully look forward to trying, as we’ve been trying to do on many issues tonight, *I’m hoping we can get to some kind of solution that works for folks*.”

Mr. Klein’s attorney, Thomas Meachum, Esquire, made concluding remarks, after which Councilman Ulman asked him: “... in the Planning Board comments on this matter, and I could ask Mr. Klein, but you being a land use attorney, the comment was ‘direct DPZ, they want R-20, and said direct DPZ to explore expanding accessory uses for retail nursery conditional uses.’ Any comment on their comment?” Mr. Meachum responded that a conditional use requires a land owner to file a request and that a hearing be held each and every time the owner wants to change a use on property, and expressed that in the case of Petitioners it would seem unnecessary. Councilman Ulman responded that residents “may say ‘yeah, a little café along with the garden center might be a

wonderful addition, but B-1 opens the doors to lots of other things.’ *I’m not saying that this is my position*, but that’s what I was hearing....” (emphasis added).

David Elsaesser, a resident of Whistling Winds Walk and a Protestant in this case, testified against the proposed rezoning on October 3, 2003. Following his testimony, Councilman Ulman asked Mr. Elsaesser: “Would you be willing to sit down with Mr. Klein after this hearing and maybe some of the residents to talk through some of these issues and concerns?” Mr. Elsaesser responded that he would be willing to talk.

No one at the October 3, 2003 public hearing testified or otherwise appeared to recognize or understand that the Garden Center was a nonconforming use, and that its ability to expand or enlarge was circumscribed by Section 129 of the Zoning Regulations, regardless of discussions or agreements with neighboring property owners. The Council’s membership had changed since the passage of ZRA 30 and, in any event, ZRA 30 was an extensive bill that made numerous changes to the Zoning Regulations, in addition to removing retail garden centers as conditional uses from the R-20 Zoning District. Following the October 3, 2003 public hearing, the County Council voted to deny Petitioners’ request to rezone the subject property from R-20 to B-1.

g. In 2008, Petitioners filed a petition to modify the Decision and Order issued by the Board of Appeals in 1989, Case No. BA 08-017C. Thereafter, by letter dated April 9, 2008, DPZ informed Petitioners that it could not process their petition for modification because the retail garden center use of the property had been rendered nonconforming through ZRA 30. DPZ indicated that it “regret[ed] not discovering this issue earlier, but sometimes issues ... are not uncovered until more detailed research is done after a case is submitted.”

2. The zoning and development history of adjacent properties is also undisputed. As indicated in the Technical Staff Report of DPZ, the properties across MD 108 to the northwest (Parcel 100 and Parcel 185) were zoned R-40 in the 1961 Comprehensive Zoning and R in the 1977 and 1985 Comprehensive Zonings. In 1992, the parcels were rezoned to RC-DEO by ZB 928, a zoning classification that was continued in the 1993 and 2004 Comprehensive Zonings.

The property that adjoins the subject property to the northeast (Parcel 242) is used as a cemetery and is currently zoned R-20. Like the subject property, it was previously zoned R, and was rezoned R-20 in the 1993 Comprehensive Zoning. The property that adjoins the property to the southwest (Parcel 218) is the site of the Linden Linthicum United Methodist Church. It shares the same basic zoning history as the cemetery and the Garden Center property.

The remaining properties to the east and south are currently zoned NT (New Town), and have been zoned NT since the zoning district was created in the 1960's. This area of the NT district, the Village of River Hill, was not developed until approximately 1999. The subject adjoining land is Open Space Lot 139, which is wooded and has a paved path. Beyond the Open Space Lot are single-family detached dwellings which front to Whistling Winds Walk and Little Bells Row.

3. D. Dennis Dunn, Jr., Landscape Architect, was Senior Design Manager for Rouse Company prior to its acquisition by Howard Hughes Corporation, and was responsible for performing site and land planning on behalf of Rouse for the Village of River Hill. Mr. Dunn testified on behalf of Petitioners that Rouse was aware of the special exception on the subject property prior to designing and developing the Village of River Hill, and anticipated that it would eventually be rezoned for commercial use, given its triangular shape, orientation to Route 108, and conclusion that it was ill-suited for residential development. Mr. Dunn testified to

employing a series of land planning techniques in order to provide screening, buffering, and separation between the Garden Center property and the residential lots on Whistling Woods Walk, including berms, grade separation, open space, dense landscaping, and natural vegetation.

4. Robert L. Cardoni, the CPA for the Garden Center, testified that the Garden Center's annual sales have declined considerably over the course of the last three years. He stated that Petitioners need to expand their business in order to survive and be profitable.

5. Monty A. Rahman, Principal and Owner of the Mars Group, testified that Mars Group was retained to study the impact of road noise on the potential residential redevelopment of the Garden Center property. Mr. Rahman testified that a 10 to 12 foot high concrete wall would have to be erected along the frontage of the Garden Center property in order to mitigate the impact of road noise on any residential redevelopment. Mr. Rahman testified that, although effective for noise abatement purposes, an earthen berm would use much more space as compared to a concrete wall, and would result in a disproportionate loss of developable area within a constrained site.

6. Melanie Moser, a Landscape Architect with over thirty years of land planning experience in Howard County, testified to having reviewed the zoning history of the subject property, and the record from Petitioners' request in 2003 for B-1 rezoning. Ms. Moser testified that there is no indication that the County Council was informed of the subject property's non-conforming use status. Ms. Moser also testified that the Council did not consider the impact of road noise on potential residential redevelopment.

Ms. Moser stated that she concurs with DPZ that the Garden Center property is part of an existing commercial institutional corridor along Route 108. Ms. Moser testified that the shape of the subject property and its location along Route 108 make it ill suited for residential

redevelopment. According to Ms. Moser, there are no sidewalks along Route 108 and no way for residents to walk children to school. Moreover, trails and open space are not options because the subject property is not part of the NT District. Ms. Moser stated that demolition and removal of the Garden Center is a significant, additional cost that would have to be factored into residential redevelopment. She stated that the subject property is oriented toward the commercial institutional corridor and not toward the neighborhood behind the Garden Center. Ms. Moser reviewed photographs of nearby residential developments, their relationships to neighboring business uses, and the land planning techniques that are used to buffer the residential and business uses, and concluded that the residences on Whistling Winds Walk, which are separated from the Garden Center by open space and deciduous materials, have just as much and, in a number of cases, more buffering from business uses than nearby residential developments.

Ms. Moser testified that other properties in the commercial corridor are zoned B-2, a more intense zoning classification than the requested B-1. According to Ms. Moser, the only residence along Route 108 in the area of the Garden Center is the house behind Lutfi's Salon, to the northeast of the Garden Center property. Lutfi's Salon, which also fronts to Route 108, is currently zoned B-1. Ms. Moser testified that most of the activities associated with B-1 zoning occur indoors, as opposed to the Garden Center, which conducts activities outdoors. Ms. Moser opined that, in her professional opinion, the most suitable zoning classification for the subject property is B-1.

7. Stephen Klein also testified that he believes the most appropriate zoning for the subject property is B-1. Mr. Klein testified that the vast majority of Garden Center's business is seasonal, and that the existing nonconforming use prevents him from expanding the Garden

Center into a non-seasonal, year round enterprise. Mr. Klein testified that he needs flexibility in order to grow his business and sell goods that are not authorized by the nonconforming use. Mr. Klein stated that the Garden Center has not experienced growth for three years. He acknowledged that the decline in his business coincided with the national recession. Mr. Klein stated that, in response to concerns expressed by Mr. Elsaesser and his wife, he constructed a privacy fence along the full outer perimeter of the storm water management facility to the rear of the subject property.

8. A number of others testified in support of the petition, including Petitioner Cathy Klein, James Chaisson, member of Linden-Linthicum Church, Brian England, British American Auto Sales, George Hane, Kurt Zanelotti, Terry Parkinson, and Shel Kelly. Generally, the testimony of those in support of the requested rezoning was that Petitioners and the Garden Center have provided great services to the community, that granting the request for B-1 zoning would benefit the Garden Center and ensure that it remains a viable business, and would not have a detrimental impact on surrounding properties.

9. Protestants consisted of several residents of Whistling Winds Walk, including David Elsaesser, who acted as their spokesperson, Cynthia Asoka, Anson Asoka, Shengjun Liu, and Shawn Shaw. Mr. Elsaesser introduced and reviewed a slide presentation, which included a number of arguments against the proposed rezoning, including that: (1) the nonconforming use status of the property was irrelevant and the Council did not err in failing to consider it during the 2004 Comprehensive Zoning; (2) the noise study conducted by Mars Group was flawed; (3) the Garden Center is not part of the existing commercial district along Route 108; (4) B-1 zoning is incompatible with nearby residences; and (5) Petitioners have violated their current zoning. Other residents of Whistling Winds Walk further testified to concerns regarding the impact of B-

l zoning, including noise, odors, and animals resulting from a potential restaurant on the Garden Center property, increased traffic along Route 108, and the belief that B-1 zoning would negatively impact their property values.

10. Susan Smith, River Hill Village Manager, testified on behalf of the River Hill Community Association against the proposed rezoning. Ms. Smith stated that the Association opposed rezoning to B-1 because of concerns about other B-1 uses, including a restaurant, and the potential for increased traffic on Route 108.

11. Petitioners' argument for the requested B-1 zoning is premised on two alleged mistakes in the 2004 Comprehensive Zoning. First, Petitioners maintain that in the 2004 Comprehensive Zoning process, the Council was misinformed that the Garden Center was operating as an existing conditional use, when in fact it was operating as an unconfirmed nonconforming use, and relied upon this misinformation in denying the requested B-1 zoning. Second, Petitioners assert that the impact of road noise on residential development was unavailable to the Council during the last comprehensive zoning, and that had the Council known of the impact and the mitigation measures necessary, the Council would have rezoned the property B-1. The Board finds merit in the former, but not the latter of these two contentions.

12. Dealing first with Petitioners' mistake argument concerning noise, the Board is not persuaded that the Council erred in failing to consider the impact of noise on the residential redevelopment of the Garden Center property during the 2004 Comprehensive Zoning. Mr. Rahman testified that mitigation measures could be employed to mitigate road noise along Route 108, including a 10 to 12 foot concrete wall, which would not require as much space as an earthen berm. Moreover, Petitioners acknowledge that even if they used an earthen berm to buffer road noise, they could still redevelop the property for residential purposes. That necessary

mitigation measures might very well result in a development that is less attractive to potential residents or the construction of fewer single family homes, while perhaps relevant to the most appropriate zoning category for the subject property, does not establish that the Council erred in failing to consider the impact of noise in the last comprehensive rezoning. Simply put, there is no evidence suggesting that the Council was unaware of the impact of noise, that any mistaken assumption regarding noise played a role in the Council's decision to retain R-20 zoning, or that the Council would have rezoned the property B-1 had information regarding noise mitigation been specifically made available to them.

13. On the other hand, the Board finds that there is ample evidence demonstrating that the Council made a mistake in the 2004 Comprehensive Zoning in relying upon the mistaken and erroneous assumption that the Garden Center was a valid conditional use when, in fact, it was an unconfirmed nonconforming use. In *White v. Spring*, the Court of Special Appeals provided a "simplified statement [that] accurately and fully states the law" on zoning mistake:

The finding of mistake or error is not so much concerned with the logical validity or merit of ultimate conclusion-drawing as it is with the adequacy and accuracy of the factual premises that underlie the conclusion-drawing. *A conclusion based on a factual predicate that is incomplete or inaccurate may be deemed, in zoning law, a mistake or error*; an allegedly aberrant conclusion based on full and accurate information, by contrast, is simply a case of bad judgment, which is immunized from second-guessing.

109 Md. App. 692, 698 (1996) (emphasis added), *cert. denied*, 343 Md. 680 (1996).

It is beyond dispute that the Council was presented with erroneous information about the property during the last comprehensive rezoning; indeed, DPZ and Petitioners' own counsel, Thomas Meachum, informed the County Council that the Garden Center was a valid conditional use. Zoning Counsel acknowledges that the Council was provided with erroneous information, but maintains that Petitioners have failed to meet their high burden of demonstrating mistake

because “the record is completely devoid of evidence to demonstrate that the Council *relied upon those premises* in denying Petitioners’ request to rezone the Property during the 2004 comprehensive zoning process.” Memorandum of Zoning Counsel in Opposition to Petition for Rezoning, at p. 7 (emphasis in original). The Board disagrees.

A nonconforming use is “any lawful existing use, whether of a structure or a structure of land, which does not conform to the use regulations of the zoning district in which it is located....” Howard County Zoning Regulations (“HCZR”), § 129A. Nonconforming uses are usually allowed to continue with the expectation that they will eventually disappear, the objective being to extinguish them as early as possible with due regard to the lawful interest of those entitled to such use.” *Stieff v. Collins*, 237 Md. 601, 604 (1965). In an effort to accomplish this goal, the Zoning Regulations substantially limit the ability of a property owner to extend, enlarge or alter a nonconforming use. Under Section 129 of the Zoning Regulations, the Hearing Authority may authorize the extension or enlargement of a nonconforming use, but only if the changes or additions “will not change the use in any substantial way.” HCZR, § 129E.1.a. Moreover, Section 129 does not expressly allow the property owner to seek changes in the approved operating hours of the conditional use or, in the case of a retail garden center, to operate a deli café or to expand its goods and services that, as Petitioners expressed they wished to do in the last comprehensive rezoning. It could be argued, and it would likely be found that such changes or additions would change the use of the Garden Center in a “substantial way.”

Yet, the evidence before the Board, namely, the comments by then Councilman Ulman and by Petitioners’ own counsel, Thomas Meachum, as set forth in paragraph 1 above, demonstrate that the Council relied upon the mistaken belief that Petitioners could work within the conditional use structure in order to accomplish their business goals. Councilman Ulman specifically asked Mr. Meachum about possible expansion of the conditional use on the property and the Council was led to believe, based upon

Mr. Meachum's response, as well as the recommendation by DPZ, that expansion of the conditional use was possible. Councilman Ulman's repeated request that Petitioners work through concerns with the neighbors constitute further evidence that the Council relied upon the belief that the Garden Center was a valid conditional use and could possibly seek expansion. Finally, given Councilman Ulman's comments regarding the quality of Petitioners' business and its service to the community, it is clear that, if the Council had been informed that the Garden Center was a nonconforming use, the Council would not have simply retained the R-20 zoning classification with the express and intended purpose that the Garden Center go out of business as soon as possible.

14. Having found that Petitioners have adequately demonstrated mistake during the 2004 Comprehensive Zoning, the Board finds that B-1 is the most appropriate zoning for the property for the reasons stated by Ms. Moser, as set forth in paragraph 6 above. The shape of the property, its orientation to Route 108, its location within an existing commercial corridor, the lack of sidewalks and inability to connect the subject property through pathways to the existing NT zoned properties, all lead to this conclusion.

The Board further finds that B-1 rezoning will not have a negative impact on vicinal properties or on the neighboring River Hill community. The zoning is consistent with the zoning and use of neighboring properties that front to Route 108 in the surrounding area. As Mr. Dunn and Ms. Moser convincingly testified, the residential properties on Whistling Winds Walk are adequately buffered from the Garden Center property. Although Protestants testified to having concerns about traffic, and the negative impact of other possible B-1 uses, Protestants have failed to submit any convincing evidence that B-1 rezoning would result in greater traffic, or that other B-1 uses would negatively impact surrounding properties. Other properties in the Route 108 commercial corridor are zoned B-1 and B-2, are adjacent to residential uses, and have not negatively impacted surrounding properties. Moreover, the property has been used

commercially for more than twenty years, and the rezoning will simply legitimize this long-standing commercial use.

CONCLUSIONS OF LAW

1. Petitioners, in seeking a piecemeal zoning reclassification, have the burden of demonstrating mistake in the last comprehensive zoning of the subject property or change in the character of the neighborhood of the subject property since the last comprehensive zoning. If this burden is met, the Board is permitted, but not compelled to grant the rezoning request. Petitioners relied on alleged mistake in the 2004 Comprehensive Zoning as its justification for rezoning in this case.

2. There is sufficient evidence in the record demonstrating mistake in the 2004 Comprehensive Zoning of the subject property to the R-20 District, as identified in the Department of Planning and Zoning's Technical Staff Report and the Board's findings of fact above, to overcome the strong presumption of correctness attached to that comprehensive zoning.

3. Petitioners have met the onerous burden of proving strong evidence of mistake in the 2004 Comprehensive Zoning of the property sufficient enough to permit the requested rezoning of the property to B-1, as provided in the Board's findings of fact above.

4. Petitioners have demonstrated that the Council made a mistake in the 2004 Comprehensive Zoning in relying upon the mistaken and erroneous assumption that the Garden Center was a valid conditional use when, in fact, it was an unconfirmed nonconforming use, for the reasons stated in the above findings of fact.

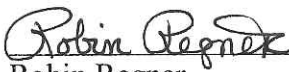
5. Petitioners have presented sufficient evidence for the Board to conclude that the appropriate zoning category for the subject property is the B-1 Zoning District as set forth in the

Board's findings above. Accordingly, the Board concludes that B-1 is the appropriate zoning for the subject property.

For the foregoing reasons, the Zoning Board of Howard County, on this 18th day of October, 2011, hereby GRANTS Petitioners' request for rezoning of the subject property from the R-20 to the B-1 Zoning District.

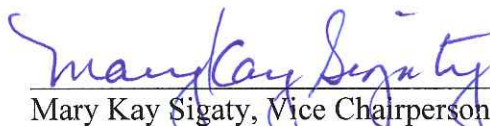
ATTEST:

ZONING BOARD OF HOWARD COUNTY

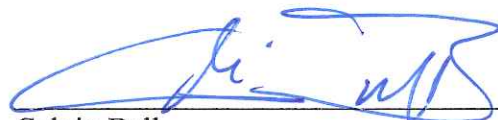

Robin Regner
Administrative Assistant


Courtney Watson, Chairperson *

PREPARED BY HOWARD COUNTY
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Calvin Ball

DISSENT
Greg Fox


Jennifer Terrasa

* Signature indicates a vote for mistake but a dissent as to the appropriateness of granting B-1 zoning.
(6/26/13 - date of correction of the meaning of signature)

ZB 1083M, Klein (River Hill Nursery)
EXHIBIT LIST

Petitioner:

1. Petition for ZB 1083M, Klein
2. Black Binder: Stephen & Cathy Klein Photograph Exhibit
3. Noise Analysis for River Hill Garden Center, April 2010
4. ZRA 30 – Council Bill 11-2001
5. Booklet with Slide Presentation by Melanie Moser
6. Topography of site and area by GIS System of Howard County (1 page)
7. Plat – Village of River Hill, 4/5, Open Space Lot 139, Sheet 2 of 2

Protestant:

1. Slide Presentation of David Elsaesser in binder